UTHAYAKUMAR PONNUSAMY v. ABDUL WAHAB ABDUL KASSIM & ORS

COURT OF APPEAL, PUTRAJAYA
MD RAUS SHARIF PCA
BALIA YUSOF WAHI FCJ
ABDUL AZIZ ABDUL RAHIM JCA
[CRIMINAL APPEAL NO: W-09-377-12-2014]
28 SEPTEMBER 2015

CIVIL PROCEDURE: *Contempt of court – Application for leave – Failure to comply with orders of court – Whether orders arose out of application or matter requiring court determination or ruling – Whether nature of order given final or interlocutory – Whether orders mere administrative directions – Whether non-compliance with directives interfered with administration of justice – Whether orders within meaning of O. 42 of Rules of the High Court 1980*

CIVIL PROCEDURE: *Contempt of court – Application for leave – Whether leave application for committal ought to be supported by statement setting out grounds on which committal was found – Whether motion for leave contained only prayers to commit for non-compliance with court directives – Whether non-filing of statement fatal to application for leave – Rules of the High Court 1980, O. 52 r. 3(2)*

The appellant was convicted and sentenced to 30 months imprisonment by the Sessions Court for an offence under s. 4 of the Sedition Act 1948. He served his imprisonment sentence at Kajang Prison and he had filed an appeal against that decision. In the course of prosecuting his appeal in the High Court, the appellant had made several requests to the court for (i) the appellant to be separated from other prisoners at Kajang Prison and to be kept with political prisoners only; (ii) the appellant to be brought to the UKM Hospital for treatment for the medical ailments he was suffering from; and (iii) the permission to see and speak to his lawyer and family members. These requests were made orally to the court by the appellant's counsel during the hearing of or case management of his appeal. In relation to the first two requests, the Deputy Registrar of the court had written a letter directed to the officer in charge of Kajang Prison conveying the judge's direction that the two requests be complied with. The appellant complained that the above directions were not complied with by the first respondent. As for the third request, the Deputy Registrar of the High Court had allowed the appellant's request to see his lawyer and family members at the court lock up, but this was not allowed by the third respondent. Arising from these events, the appellant filed a motion ('encl. 3') for leave to commit the respondents to prison for contempt for disobeying the court's orders. The High Court allowed leave to commence committal proceedings against the first

respondent, but had refused leave in respect of the second and third respondents. The appellant thus appealed against that refusal. The issue in this appeal was whether the so-called 'orders' of the court which the appellant said the second and third respondents had failed to comply with were orders within the meaning of O. 42 of the Rules of the High Court 1980 (now the combined Rules of Court 2012).

Held (dismissing appeal with costs)
Per Abdul Aziz Abdul Rahim JCA delivering the judgment of the court:

(1) For an order of court to be capable of enforcement, it must be clear and definite. In this case, the so-called 'order' was clear insofar as it was related to the act to be done. An order which requires a party to do an act must specify the time after service of the order the act is to be done (O. 42 r. 6(1)). For an order to be binding on the other party, the other party must be heard before the court made such order. Ordinarily, also an order made by a court must arise out of and relate to an application or a matter before the court that requires a court determination or ruling. The purported 'orders' (in relation to the three requests made by the appellant to the court) had nothing to do with any application before the court that requires the court's final determination. What was before the court then was the appellant's appeal against his conviction and sentence under s. 4 of the Sedition Act 1948 made by the Sessions Court after a full trial. The three requests made by the appellant that resulted in the purported 'order' were not related to any issue material to the disposal of the appellant's appeal. The nature of the 'order' that was given was neither final nor interlocutory. (paras 23 & 24)

(2) There was no evidence in the appeal record that showed the respondents were heard before the court made the 'orders' following the requests by the appellant or that the respondents were asked to submit on the propriety of the requests. The purported 'order' made by the court were mere administrative directions to the respondents to be carried out by the respondents in accordance with rules administered by the respondents at the respondents' discretion and convenience. The respondents are the body and mind of a public institution called the prison – which has its own set of laws, regulations and rules that govern its operation and management of the prisoners under its care put there pursuant to an order of a competent court. (paras 25 & 26)

(3) The administrative directives issued by the court did not come within the meaning of 'order' or 'judgment' under O. 42 of the RHC 1980 (or the relevant rule in the ROC 2012) that is capable of enforcement under O. 45. The court that hears the application for leave to commence

committal must draw the distinction between a 'judgment' or 'order' within the meaning of O. 42 and an administrative direction made by the court. A breach, or non-compliance of an order that fell within the ambit of O. 42, would attract contempt proceedings. But non-compliance with an administrative directive may or may not have the same effect. (para 28)

(4) A person's liberty should not be deprived simply because he or she had failed to carry out the administrative directive issued by the court. The order that is the subject matter of the application is an order that fits the criteria of a court order, a breach of which will render the act to be contempt for interfering or impeding the course of justice. The appellant had not shown how the non-compliance with the administrative directives made by the court had prejudiced the appellant's appeal before the High Court Judge in the sense that the non-compliance tantamount to *mala fide* intention to defeat, obstruct or interfere with the administration of justice. (para 29)

(5) Under O. 52 r. 3(2), a leave application for committal must be supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal was found. The notice of motion for leave filed by the applicant showed that it contained only the prayers to commit the respondents for failure to comply with the court's directives, nothing more. It is mandatory that both statement and affidavit in support of the application must be filed and the purpose of the affidavit is to verify the facts stated and particularised in the statement alleging the contempt. Clearly, there was non-compliance with the rules. The non-filing of the statement was fatal to the appellant's application for leave. On this ground alone, the leave ought to have been refused. (paras 30 & 31)

(6) When a person is put in prison to serve his imprisonment sentence following a valid order of a competent court, some of the person's civil liberties and civil rights will be suspended until the person has completed his imprisonment sentence in accordance with the court order that puts him or her there. This is because a term of imprisonment is a punishment. It will not be a punishment if a prisoner is allowed to have the same civil rights and liberties such as freedom of movement as enjoyed by a free man outside the prison. More so in the appellant's case since the appellant by his own choice chose prison instead of applying for release on bail while waiting for his appeal to be disposed of.

Therefore, the appellant should not be complaining about deprivation of certain civil liberties and civil rights whilst serving sentence as a prisoner in Kajang Prison. (paras 34 & 35)

(7) In order to carry out the directives by the court, the respondents must have regard to their own rules and regulations in handling and managing the prisoners. After all, the primary concern of the respondents as prison officers charged with the care and custody of the prisoners while they were brought to court and to take them back safely to prison once their court business was done was to ensure that the prisoners were safely in their custody. The respondents were duty bound to take any necessary and reasonable steps to ensure that none of the prisoners can escape from custody while they are in court and also when they are in transit from prison to the court and *vice versa*. Thus, this court did not think that the non-compliance with the court's directives by the respondents was deliberate and intentional to belittle the authority of the court calculated to interfere with the administration of justice. (para 39)

Bahasa Malaysia *Headnotes*

Perayu telah disabitkan dan dijatuhkan hukuman penjara 30 bulan oleh Mahkamah Sesyen untuk kesalahan di bawah s. 4 Akta Hasutan 1948. Dia menjalani hukuman penjaranya di Penjara Kajang dan telah memfailkan rayuan terhadap keputusan itu. Dalam rayuannya di Mahkamah Tinggi, perayu telah memohon daripada mahkamah agar dia (i) diasingkan daripada banduan-banduan lain di Penjara Kajang dan ditahan dengan tahanan politik sahaja; (ii) dibawa ke Hospital UKM supaya penyakitnya boleh dirawat; dan (iii) diberi kebenaran berjumpa dan bercakap dengan peguamnya serta ahli keluarganya. Permintaan-permintaan ini dibuat secara lisan kepada mahkamah oleh peguam perayu semasa perbicaraan atau pengurusan kes rayuannya. Berhubung permintaan pertama dan kedua, Timbalan Pendaftar Mahkamah menulis surat kepada pegawai bertugas Penjara Kajang menyampaikan arahan hakim bahawa kedua-dua permintaan tersebut dipatuhi. Perayu mengadu bahawa arahan-arahan tersebut gagal dipatuhi oleh responden pertama. Bagi permintaan ketiga pula, Timbalan Pendaftar Mahkamah Tinggi telah membenarkan permintaan perayu untuk berjumpa dengan peguam dan ahli keluarganya di lokap mahkamah, tetapi ini tidak dibenarkan oleh responden ketiga. Akibatnya, perayu memfailkan satu usul (lampiran 3) untuk kebenaran mengkomitkan responden-responden ke penjara kerana menghina mahkamah dengan mengingkari perintah-perintah mahkamah. Mahkamah Tinggi memberi kebenaran untuk mengkomit responden-responden terhadap responden pertama, tetapi enggan memberikan kebenaran berkenaan responden kedua dan ketiga. Perayu oleh itu merayu terhadap keputusan tersebut. Isu dalam rayuan ini adalah sama

ada perintah-perintah mahkamah tersebut yang perayu mendakwa tidak dipatuhi oleh responden kedua dan ketiga adalah perintah-perintah mengikut maksud A. 42 Kaedah-Kaedah Mahkamah Tinggi 1980 (kini digabungkan sebagai Kaedah-Kaedah Mahkamah 2012).

Diputuskan (menolak rayuan dengan kos)
Oleh Abdul Aziz Abdul Rahim HMR menyampaikan penghakiman mahkamah:

(1) Untuk perintah mahkamah dikuatkuasakan, ia harus jelas dan pasti. Dalam kes ini, perintah tersebut jelas setakat ia berhubung kait dengan tindakan yang dilakukan. Perintah yang memerlukan satu pihak melaksanakan tindakan harus menentukan masa selepas perkhidmatan perintah tindakan itu dilakukan (A. 42 k. 6(1)). Untuk perintah mengikat pihak lain, pihak lain itu harus didengar di hadapan mahkamah sebelum mahkamah membuat perintah itu. Seperti lazimnya, satu perintah yang dibuat oleh mahkamah harus timbul daripada dan berhubung permohonan atau perkara di hadapan mahkamah yang memerlukan penentuan atau pemutusan mahkamah. Perintah-perintah tersebut (berhubung ketiga-tiga permintaan yang dibuat oleh perayu ke mahkamah) tidak mempunyai kaitan dengan permohonan di hadapan mahkamah yang memerlukan keputusan muktamad mahkamah. Apa yang dihadapkan ke mahkamah adalah rayuan perayu terhadap sabitan dan hukumannya di bawah s. 4 Akta Hasutan 1948 yang dibuat oleh Mahkamah Sesyen selepas perbicaraan penuh. Permintaan-permintaan yang dibuat oleh perayu yang membawa kepada perintah itu tiada kaitan dengan apa-apa isu yang penting kepada pelupusan rayuan perayu. Jenis perintah yang diberikan tidak muktamad dan bukan interlokutori.

(2) Tiada keterangan dalam rekod rayuan yang menunjukkan bahawa responden-responden dibicarakan di mahkamah sebelum mahkamah membuat perintah berikutan permintaan perayu atau responden-responden diminta berhujah mengenai kewajaran permintaan. Perintah yang dibuat oleh mahkamah hanya arahan pentadbiran semata-mata kepada responden-responden untuk dilaksanakan oleh responden-responden menurut peraturan-peraturan yang ditadbir oleh responden-responden mengikut budi bicara dan kemudahan responden-responden. Responden adalah badan dan minda sesuatu institusi awam yang dipanggil penjara – yang mempunyai undang-undang, peraturan-peraturan dan kaedah-kaedah sendiri yang mentadbir operasi dan pengurusan penjagaan tahanan-tahanan yang berada di bawah jagaannya menurut perintah mahkamah.

(3) Arahan pentadbiran yang dikeluarkan oleh mahkamah bukan menurut maksud 'perintah' atau 'penghakiman' di bawah A. 42 KMT 1980 (atau peraturan-peraturan relevan dalam KKM 2012) yang boleh dikuatkuasakan di bawah A. 45. Mahkamah yang mendengar permohonan untuk kebenaran mengkomit harus membuat perbezaan antara 'penghakiman' atau 'perintah' dalam maksud A. 42 dan arahan pentadbiran yang dibuat oleh mahkamah. Pelanggaran, atau ketidakpatuhan perintah yang terangkum dalam A. 42, akan meraih prosiding menghina mahkamah. Tetapi ketidakpatuhan arahan pentadbiran mungkin atau mungkin tidak mempunyai kesan yang sama.

(4) Kebebasan seseorang tidak boleh dilucutkan hanya kerana dia gagal melaksanakan arahan pentadbiran yang dikeluarkan oleh mahkamah. Perintah yang menjadi perkara permohonan adalah perintah yang memenuhi kriteria perintah mahkamah, di mana pelanggarannya akan menjadikan perbuatan itu menghina kerana mengganggu atau menghalang proses keadilan. Perayu tidak menunjukkan bagaimana ketidakpatuhan arahan pentadbiran yang dibuat oleh mahkamah telah memprejudiskan rayuan perayu di hadapan Hakim Mahkamah Tinggi dalam erti kata bahawa ketidakpatuhan itu sama seperti niat *mala fide* untuk mengalahkan, menghalang dan mengganggu pentadbiran keadilan.

(5) Di bawah A. 53 k. 3(2), permohonan kebenaran mengkomit harus disokong oleh suatu pernyataan yang menyatakan nama dan perihal pemohon, serta nama, perihal dan alamat pihak yang hendak dikomitkan dan alasan-alasan pengkomitannya. Penelitian teliti notis usul untuk kebenaran yang difailkan oleh pemohon menunjukkan bahawa ia hanya mengandungi tuntutan-tuntutan untuk mengkomit responden-responden atas kegagalan mematuhi arahan mahkamah, tidak lebih daripada itu. Adalah wajib bagi kedua-dua kenyataan dan afidavit sokongan permohonan difailkan dan tujuan afidavit adalah untuk mengesahkan fakta yang dinyatakan dan dibutirkan dalam kenyataan yang mendakwa penghinaan. Jelas sekali, terdapat ketidakpatuhan dengan peraturan-peraturan. Kegagalan memfailkan kenyataan menjejaskan permohonan perayu untuk kebenaran. Atas alasan ini sahaja, kebenaran sepatutnya ditolak.

(6) Apabila seseorang dipenjarakan untuk menjalankan hukuman penjaranya menurut perintah sah mahkamah, hak kebebasan awam dan hak-hak sivil individu itu akan digantung sehingga individu itu selesai hukuman pemenjaraannya menurut perintah mahkamah yang telah menghantarnya ke penjara. Ini kerana tempoh pemenjaraan adalah satu hukuman. Ia bukan hukuman jika tahanan dibenarkan hak-hak sivil dan kebebasan seperti kebebasan bergerak yang dinikmati oleh orang yang bebas di luar

penjara. Lebih-lebih lagi dalam kes perayu kerana perayu melalui pilihannya sendiri memilih penjara dan bukannya memohon pembebasan dengan ikat jamin sementara menunggu rayuannya dilupuskan. Oleh itu, perayu tidak boleh mengadu mengenai pelucutan hak-hak kebebasan dan sivil apabila menjalankan hukumannya sebagai tahanan di Penjara Kajang.

(7) Untuk menjalankan arahan mahkamah, responden-responden mesti mengambil kira peraturan dan undang-undang mereka sendiri dalam mengendalikan dan menguruskan banduan. Lagipun, kebimbangan utama responden sebagai pegawai penjara yang diberikan tanggungjawab untuk mengawal dan menjaga tahanan apabila mereka dibawa ke mahkamah dan untuk membawa mereka balik ke penjara dalam keadaan selamat setelah selesai dengan urusan mahkamah adalah untuk memastikan tahanan adalah selamat dalam jagaan mereka. Responden-responden mempunyai tanggungjawab untuk mengambil langkah-langkah perlu dan munasabah bagi memastikan tiada banduan melarikan diri dari tahanan semasa mereka di mahkamah dan juga apabila mereka berada dalam transit dari penjara ke mahkamah dan sebaliknya. Oleh itu, mahkamah ini tidak berpendapat bahawa ketidakpatuhan arahan mahkamah oleh responden adalah dengan sengaja dan bertujuan untuk memperkecilkan kuasa mahkamah sekaligus mengganggu pentadbiran keadilan.

Case(s) referred to:

Attorney-General v. Butterworth [1963] 1 QB 696 ***(refd)***
Attorney-General v. Newspaper Publishing Plc [1987] 3 All ER 276 ***(refd)***
Bozson v. Altrincham Urban District Council [1903] 1 KB 547 ***(refd)***
Haron Mohd Zaid v. Central Securities (Holdings) Bhd [1982] CLJ 293; [1982] CLJ (Rep) 26 PC ***(refd)***
In Re Bramblevale Ltd [1970] 1 Ch 128 ***(refd)***
J & M Power Sdn Bhd v. J & M Power Resources Sdn Bhd [2012] MLJU 640 ***(refd)***
Jasa Keramat Sdn Bhd v. Monatech (M) Sdn Bhd [2001] 4 CLJ 549 CA ***(refd)***
Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors [2012] 2 CLJ 849 FC ***(refd)***
TO Thomas v. Asia Fishing Industry Pte Ltd [1977] 1 LNS 126 FC ***(refd)***

Legislation referred to:

Prison Act 1995, s. 26
Prisons Regulations 2000, reg. 4
Rules of Court 2012, O. 52 rr. 3(2), 6(3)
Rules of the High Court 1980, O. 14, O. 42 r. 6(1), O. 45, O. 52 r. 2(2)
Sedition Act 1948, s. 4

For the appellant - M Manogar; M/s Manogar & Co
For the respondents - Azlina Rasdi; DPP

[Editor's note: Appeal from High Court, Kuala Lumpur; Criminal Application No: 44-53-04-2014 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Aziz Abdul Rahim JCA:

[1] The appellant was convicted and sentenced to 30 months imprisonment on 5 June 2013 by the Sessions Court at Kuala Lumpur for an offence under s. 4 of the Sedition Act 1948. He served his imprisonment sentence at Kajang Prison. The appellant had filed an appeal against that decision.

[2] The offence is a bailable offence. However the appellant refused, on the ground of principles of his belief, to apply for bail pending his appeal to the High Court against his conviction and sentence. Instead the appellant chose to serve his imprisonment sentence.

[3] In the course of prosecuting his appeal in the High Court the appellant had made several requests to the court. The first request was for the appellant to be separated from other prisoners at Kajang Prison and to be kept with political prisoners only. The second request was for the appellant to be brought to the UKM Hospital for treatment by Prof Dr Shanmugarajah for the medical ailments that he was suffering from. The third request by the appellant was for permission to see and speak to his lawyer and family members. These requests were made orally to the court by the appellant's counsel during the hearing of or case management of his appeal.

[4] In relation to the first two requests, the Deputy Registrar of the court had, on 12 December 2013, wrote a letter directed to the officer in charge of Kajang Prison conveying the judge's direction that the two request be complied with. This letter was exhibited by the appellant in his application for leave to commit the respondents for contempt as exh. UK-1. The said letter is reproduced below for its full appreciation:

Ruj. Tuan:
Ruj. Kami: WPRJ 42S-91-07/2013
Tarikh :

Pegawai Yang Menjaga
Penjara Kajang
Kajang, Selangor

Tuan/Puan,

Wilayah Persekutuan Rayuan Jenayah Bil : 42S-91-07/2013
(Mahkamah Sesyen Kuala Lumpur Kes Tangkap No: 14-62-548-2007)

Uthayakumar a/l Ponnusamy
Lawan
Pendakwa Raya

Dengan hormatnya saya merujuk kepada perkara di atas.

2. Adalah dimaklumkan bahawa kes ini telah ditetapkan untuk Bicara pada 15.1.2014 di hadapan YA Hakim Dato' Mohd Azman bin Husin.

3. Pada tarikh yang lepas, berdasarkan permohonan dari Peguambela Perayu, YA Hakim telah mengarahkan supaya perayu dirujuk ke Hospital Universiti Kebangsaan Malaysia untuk mendapatkan rawatan lanjut bagi penyakit yang dihadapinya.

4. Selanjutnya YA Hakim juga mengarahkan supaya Perayu ini diasingkan dari banduan-banduan lain dan hanya ditempatkan dengan banduan politik sahaja.

5. Kerjasama dan perhatian awal pihak tuan berhubung perkara tersebut di atas amatlah dihargai.

Sekian terima kasih.

"BERKHIDMAT UNTUK NEGARA"

Saya yang menurut perintah,

(NOOR AINI BINTI YUSOF)
TIMBALAN PENDAFTAR
BAHAGIAN JENAYAH
MAHKAMAH TINGGI
Kuala Lumpur
(Tel: 03-62094592/4604)

s.k
Timbalan Pendakwa Raya
Jabatan Peguam Negara
Bahagian Perbicaraan dan Rayuan
Aras 5, No. 45 Presint 4
Persiaran Perdana
52100 Putrajaya

[5] The appellant complained that the above directions given by the learned judge on 9 December 2013 were never complied with by the first respondent.

[6] As for the third request, this was made on two occasions. The first occasion was on 22 November 2013 when during case management, the Deputy Registrar of the High Court had allowed the appellant's request to see his lawyer and family members at the court lock up. But this was not allowed by the third respondent who was put in charge of the appellant at

A the material time. Instead after the case management, Prison Inspector McKenzie (the third respondent) immediately took the appellant back to Kajang Prison. The second occasion was on 15 February 2014 where the learned judge had allowed similar request by the appellant. Again, the direction given by the learned judge was not complied with by the second
B respondent, the prison officer in charge at that time.

[7] Arising from these events and the conduct of the prison officers concerned, the appellant had filed a motion dated 28 April 2014 at Kuala Lumpur High Court (encl. 3) for leave to commit the respondents to prison for contempt for disobeying court's orders. The orders that the appellant
C complained that were disobeyed by the respondents were the three directives mentioned above. The motion was supported by an affidavit affirmed by the appellant on 10 April 2014. The motion was opposed by the respondents.

[8] The appellant's affidavit in support contained not only the complaint that the court's directives were not complied with, but also complaints as to
D the purported bad treatment given to the appellant at Kajang Prison, which complaints in our view are not really relevant for the determination of the leave application.

[9] In any case, on hearing the motion, the High Court allowed leave to commence committal proceedings against the first respondent, the officer in
E charge of the Kajang Prison; but had refused leave in respect of the second and third respondents who were then responsible for the appellant during the Kuala Lumpur's High Court proceedings.

[10] The appellant is now appealing against that refusal. For the record,
F there is no cross appeal by the first respondent against the leave that was granted to the appellant.

The High Court's Decision

[11] In considering the application for leave, the learned High Court Judge had applied the correct test that is an applicant must prove his case beyond
G reasonable doubt (see: *In Re Bramblevale Ltd* [1970] 1 Ch 128, 137 and *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* [2012] 2 CLJ 849). The learned judge also found that the directions by the court which the respondents were said to have failed to comply with were oral directions. The learned judge also found that the respondents had failed to comply with
H those directions. However, having considered the appellant's application for leave (encl. 3) and the affidavits filed supporting and opposing the application, the learned judge granted leave only against the first respondent. Leave was refused against the second and third respondents. In refusing the leave, the learned judge said in his judgment as follows:

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meneliti affidavit sokongan pemohon dan affidavit jawapan responden keseluruhannya, mahkamah berpendapat bahawa pemohon gagal melepaskan beban bukti melampaui keraguan yang munasabah ke atas responden 2 dan responden 3. (pp 22-23 Appeal Record).

Submission By The Appellant

[12] For the appellant it was submitted that the second respondent had admitted in his affidavit in reply to the motion in encl. 3 that the learned High Court Judge had made the order and did not deny that the order was made. However, the second respondent's excuse for not following the court's order (to allow the appellant to see his lawyer and family members at the court lock up) was due to security reasons and that the Kuala Lumpur High Court Complex was not gazetted as a lock up area. It was submitted that it is not for the second respondent to give such excuses.

[13] As for the third respondent it was submitted that he too admitted that an order was made by the court to allow the appellant to meet the appellant's family and lawyer but the third respondent on his own decided that for security reason that could not be allowed and that the temporary detention centre at the Kuala Lumpur High Court is not a gazetted lock up area.

[14] It was further submitted for the appellant that the second and third respondents as Government servants must set examples in obeying court orders. It was also contended that the two respondents decided the matters on their own without referring them to their superiors first. As for the law it was submitted that *mens rea* of the contemnors need not be proven as it is not an ingredient to be proved in contempt proceedings (see: *Re AG's Application, AG v. Butterworth* [1963] 1 QB 696, *T.O Thomas v. Asia Fishing Industry Pte Ltd* [1977] 1 LNS 126; [1977] 1 MLJ 151 FC). It was argued that if the orders of the court could not, for some reasons be complied with, the respondents should have the orders varied by the court.

Submissions By The Respondents

[15] For the second and third respondents, the learned Senior Federal Counsel submitted that the court should be slow in granting leave to commence committal proceedings and that the procedural rules applicable must be strictly complied with. This is because, it was submitted, in contempt proceedings the liberty of the subject is involved.

[16] It was further submitted that the appellant's application had failed to comply with the requirement of O. 52 of the then RHC 1980. Relying heavily on *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* (*supra*), it was submitted that O. 52 contains safeguards as to application for committal proceedings. Therefore it was argued that the requirement of O.

52 must be strictly observed, since a contempt of court is an offence of a criminal character and committal is a very serious matter. It was further submitted that the courts must proceed very carefully before they make an order to commit to prison. Non-compliance with the rules is fatal and renders the application defective.

[17] Order 52 r. 2 provides that no application to a court for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule. In *Tan Sri Dato' (Dr) Rozali Ismail* (*supra*) it was said that the safeguards in O. 52 r. 2(2) entail the application to be supported by a statement describing amongst others, the person sought to be committed and the grounds on which he is alleged to be in contempt. It must be supported by an affidavit verifying the facts relied on in the statement. The statement of facts must accompany the application to the court.

[18] In the instant case the learned Senior Federal Counsel submitted that the appellant's application had failed to state that it was for leave to pursue committal proceeding. It was submitted that even though in his corrective affidavit (dated 16 May 2014) the appellant had mentioned about the amendment to the application, there was no application made to the court to amend the motion and no amended motion was filed. This defect in the motion was submitted, was serious and fatal.

[19] It was also submitted that the appellant had failed to show a *prima facie* case that the respondents had acted *mala fide* and had intention to impede or interfere with the administration of justice.

Our Decision

[20] The issue in this appeal is whether the so called 'orders' of the court which the appellant said the second and third respondents have failed to comply are orders within the meaning of O. 42 of the RHC 1980, (now the combined ROC 2012) which is capable of execution or enforcement and one that gives relief to the appellant arising out of his application to court or are the purported 'orders' nothing more than a mere administrative directions to be carried out at the discretion and convenience of the party against whom the directives were directed? It is pertinent for the appellant to state clearly in his application for leave to commence committal proceedings the order of the court and the nature of the order that was said to have been breached or disregarded by the respondents.

[21] An order of the court can either be an interlocutory order or a final order. In either case, the effect of the order is, if it is a final order to dispose the rights of the parties; and if it is an interlocutory order it is to preserve the *status quo* of the parties until the dispute is finally disposed of. For example, an order under O. 14 will dispose of the right of a plaintiff for a claim under a summary judgment against a defendant. An order for interim

injunction restraining either a plaintiff or a defendant from taking any action to enforce a right is interlocutory in nature; the effect is to preserve the *status quo* of the parties in respect of the rights which form the subject matter of the disputes between them until such rights have been finally determined. Such order would be capable of enforcement under O. 45; and breach of which would ordinarily results in contempt of the court.

[22] The test applicable to determine the nature of the order is known as the "*Bozson* test' which is derived from the English case of *Bozson v. Altrincham Urban District Council* [1903] 1 KB 547. This test was applied by our Federal Court in *Haron Mohd Zaid v. Central Securities (Holdings) Bhd* [1982] CLJ 293; [1982] CLJ (Rep) 26; [1982] 2 MLJ 94. Applying this test we hold that the directives issued by the court in this case are neither final order nor interlocutory in nature. They are entirely unrelated to the issue that requires the court determination.

[23] It is trite that for an order of court to be capable of enforcement it must be clear and definite. In our case the so called 'order' is clear insofar as it relates to the act to be done. An order which requires a party to do an act must specify the time after service of the order the act is to be done (O. 42 r. 6(1)). However it is not definitive to time and place as to when and where it was to be carried out.

[24] It is worthy to note that for an order to be binding on the other party, the other party must be heard before the court made such order. Ordinarily also an order made by a court must arise out of and relate to an application or a matter before the court that requires a court determination or ruling. In the instant appeal the purported 'orders' (in relation to the three requests made by the appellant to the court) had nothing to do with any application before the court that requires the court's final determination. What was before the court then was the appellant's appeal against his conviction and sentence under s. 4 of the Sedition Act 1948 made by the Sessions Court after a full trial. The three requests made by the appellant that resulted in the purported 'order' were not related to any issue material to the disposal of the appellant's appeal. The nature of the 'order' that was given was neither final nor interlocutory. It appears to us that the 'order' made by the court was made of out compassion and consideration of personal wellbeing of the appellant and his family.

[25] There is also no evidence from the notes of proceedings in the appeal record that shows the respondents were heard before the court made the 'orders' following the requests by the appellant. There was nothing in the notes of proceedings that suggests the respondents were asked to submit on the propriety of the requests.

A **[26]** On the above considerations we are inclined to regard the purported 'order' made by the court as a mere administrative directions to the respondents to be carried out by the respondents in accordance with rules administered by the respondents at the respondents' discretion and convenience. In this regard, it is important to be bear in mind that the B respondents are the body and mind of a public institution called the prison – which has its own set of law, regulations and rules that govern its operation and management of the prisoners under its care put there pursuant to an order of a competent court.

[27] This makes it more pertinent for the prison authority to be heard or C consulted before the court issued any directive to the prison authority in dealing or handling of prisoner which is entirely the responsibility of the prison officer charged with the care and safe conduct of the prisoner in their custody.

[28] It is our view that administrative directives issued by the court do not D come within the meaning of 'order' or 'judgment' under O. 42 of the RHC 1980 (or the relevant rule in the ROC 2012) that is capable of enforcement under O. 45. It is of great importance that the court that hears application for leave to commence committal to draw the distinction between a 'judgment' or 'order' within the meaning of O. 42 and an administrative E direction made by the court. A breach, or non-compliance of an order that falls within the ambit of O. 42 will attract contempt proceedings. But non-compliance with an administrative directive may or may not have the same effect. Moreover in our instant appeal there is no evidence of any undertaking given by the respondents that they will perform the act requested F of them.

[29] A person's liberty should not be deprived simply because he or she had failed to carry out the administrative directive issued by the court. If one is to peruse the cases on leave applications for committal proceedings on contempt of court, one will realise that in almost cases the order that is the G subject matter of the application is an order that fits the criteria of a court order, a breach of which will render the act to be contempt for interfering or impeding the course of justice (see: *Attorney-General v. Newspaper Publishing Plc* [1987] 3 All ER 276, 294 and *Jasa Keramat Sdn Bhd v. Monatech (M) Sdn Bhd* [2001] 4 CLJ 549). The appellant has not shown how the non-H compliance with the administrative directives made by the court has prejudiced the appellant's appeal before the learned High Court Judge in the sense that the non-compliance tantamount to *mala fide* intention to defeat, obstruct or interfere with the administration of justice. In *J & M Power Sdn Bhd v. J & M Power Resources Sdn Bhd* [2012] MLJU 640, the court had said

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that the applicant must prove these ingredients and it is mandatory that the requisites be satisfied on the standard of beyond reasonable doubt (see also *TO Thomas v. Asia Fishing Industry Pte Ltd* [1977] 1 LNS 126; [1977] 1 MLJ 151). Applying this principle, we cannot see how the non-compliance of the administrative order issued by the court to the respondents could deny the appellant the justice in his appeal before the High Court one way or the other.

[30] Let us be reminded that under O. 52 r. 3(2) of the Rules of Court 2012 a leave application for committal must be supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is found, and also by an affidavit verifying the facts stated in the statement. Rule 6(3) of O. 52 of the Rules of Court 2012 provides that except with leave of the court hearing an application for an order of committal, no grounds shall be relied upon at the hearing except the grounds set out in the statement supporting the application. Thus, the filing of the statement supporting the application for a committal order must specify with clarity *inter alia* the ground or grounds on which the committal is sought and the facts which formed the basis of the grounds must be verified by an affidavit filed together with the application. In this respect, and upon perusal of the motion filed by the appellant (at pp. 24-25 of the appeal record), we could not find any such statement being filed. What we have is only the affidavit in support of the motion.

[31] A careful scrutiny of the notice of motion for leave filed by the applicant shows that it contains only the prayers to commit the respondents for failure to comply with the court's directives, nothing more. The non-filing of the statement is fatal to the appellant's application for leave. The statement is the document that gives the facts particularising the alleged contemnors, the court order that was said to have been breached, the nature of the alleged contempt and the grounds on which committal is sought. The defect arising from non-filing of the statement cannot be corrected by affidavit. Firstly, reading O. 52 r. 3(2), it is mandatory that both statement and affidavit in support of the application must be filed. Secondly, the purpose of the affidavit is to verify the facts stated and particularised in the statement alleging the contempt. Clearly there has been non-compliance with the rules. On this ground alone the leave ought to have been refused.

[32] As for the affidavit in support dated 10 April 2014 filed by the appellant, except for paras. (5) to (9) both inclusive, the rest of the affidavit is made up of complaints by the appellant as to the treatment he received at Kajang Prison. These complaints were neither before the court when the requests were made to the court nor were they the subject matter of the appellant's criminal appeal pending before the High Court then. Certainly they were not the concern of the court when the court issued the directives.

Therefore they are irrelevant to the consideration whether leave should or should not be given. The complaints as to the bad or poor treatment received by the appellant in Kajang Prison were not related to or formed part of the court's directives given following the request made by the appellant. There was no application by the appellant to challenge the treatment given to and received by him whilst in the custody of Kajang Prison.

[33] In our view the allegations by the appellant that the respondents had acted *mala fide* in their treatment of the appellant at Kajang Prison by putting the appellant together with five other prisoners in one lock up instead of one prisoner to a lock up as specified in reg. 4 of the Prisons Regulations 2000 and to confine the appellant to solitary confinement in a closed isolation lock up and being denied reading and writing materials as well as being denied the 15 minutes weekly phone calls to lawyers and family or their monthly visits, are not the basis of the alleged contempt. There is no order of the court that injuncted the prison authority from doing all the acts complained of.

[34] It is reasonable in our view to expect that when a person is put in prison to serve his imprisonment sentence following a valid order of a competent court, some of the person's civil liberties and civil rights will be suspended until the person has completed his imprisonment sentence in accordance with the court order that puts him or her there. This is because a term of imprisonment is a punishment. It will not be a punishment if a prisoner is allowed to have the same civil rights and liberties such as freedom of movement as enjoyed by a free man outside the prison. More so in the appellant's case since the appellant by his own choice chose prison instead of applying for release on bail while waiting for his appeal to be disposed of. In his affidavit in support the appellant affirmed as follows:

> (2) Pada 5/6/2013 Mahkamah Sesyen Kuala Lumpur telah menjatuhkan hukuman penjara 30 bulan (2½ tahun) terhadap saya atas satu pertuduhan Hasutan.
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> (3) Pada hari yang sama saya telah dipenjarakan di Penjara Kajang setelah saya tidak mahu memohon untuk jaminan sementara menunggu rayuan. Ini adalah atas dasar prinsip perjuangan terutamanya terhadap penindasan dan penganiayaan terhadap masyarakat India miskin berbangkit daripada polisi rasisme dan ketuanan oleh kerajaan UMNO Malaysia.

[35] Therefore the appellant should not be complaining about deprivation of certain civil liberties and civil rights whilst serving sentence as a prisoner in Kajang Prison.

[36] The second issue that requires our consideration is whether the learned judge ought to issue the directives and whether the respondents must carry out the directives without regard to their own rules and regulations? In handling a prisoner, the prison officers, (including the respondents) are

governed, *inter alia*, by s. 26 of the Prison Act 1995. The section reads: A

> Custody
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> 26. (1) A prisoner:
>
> (a) confined in a prison shall be deemed to be in the lawful custody of the Officer in Charge of the prison; B
>
> (b) shall be subject to prison discipline and to all written laws relating to prisons or prisoners and to the Commissioner General's Standing Orders during the period of his imprisonment, whether or not he is within the precincts of a prison; and
>
> (c) while in the custody or under the control of a prison officer: C
>
> (i) when being taken to or from a prison;
>
> (ii) whenever he is working outside a prison; or
>
> (iii) is otherwise beyond the limits of the prison,
>
> shall be deemed to be in prison and shall be subject to all the same incidents as if he were actually in prison. D
>
> (2) Where a prisoner has escaped from lawful custody, the period during which he is at large shall not be reckoned as part of the sentence he was undergoing at the time of his escape.

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[37] It is to be observed that under the section, a prisoner is deemed to be in prison and shall be subject to prison discipline and to all written laws relating to prisons or prisoners and to the Commissioner's General Standing Orders during the period of imprisonment. This rule is applicable to all prisoners whether or not they are within the precincts of a prison.

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[38] The second respondent in his affidavit in reply affirmed on 17 April 2014 averred that he did not follow the directives given by the court to allow the appellant to see the family and lawyer for security reason. He further affirmed that a prisoner is allowed to see his family and lawyer at the lock up and the prison. The temporary detention centre at the Kuala Lumpur Court Complex he said is not gazetted as lock up; so the visit by the family and lawyer cannot be allowed. The third respondent in his affidavit in reply also made similar averments for not carrying out the court's directives. Thus the second and third respondents had explained themselves in their respective affidavits the reasons why they could not comply with the court's directives. G H

[39] In our view the explanation in the circumstances of the case is reasonable and acceptable. In our opinion it must be implied that in order to carry out the directives by the court the respondents must have regard to their own rules and regulations in handling and managing the prisoners. After all, the primary concern of the respondents as prison officers charged with I

A the care and custody of the prisoners while they were brought to court and to take them back safely to prison once their court business was done is to ensure that the prisoners are safely in their custody and they are, we believe, duty bound to take any necessary and reasonable steps to ensure that none of the prisoners can escape from custody while they were in court and also
B when they were in transit from prison to the court and *vice versa*. It must also be implied and legitimately expected that when the court issued those directives the court did not expect the respondents as responsible prison officers to comply with the directives and completely disregard the prison rules and regulations as to the safe custody of the prisoners. Viewed in this
C context, we do not think that the non-compliance with the court's directives by the respondents is deliberate and intentional to belittle the authority of the court calculated to interfere with the administration of justice.

[40] For the above reasons we dismiss this appeal with cost. We affirm the High Court's decision with regard to the second and third respondents.

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